No. 15,320

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD A. FERGUSON and AMANDA FERGUSON, husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for the District of Arizona.

BRIEF FOR THE APPELLEE

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TUCSON PTG. CO.

SUBJECT INDEX

CITATIONS

CASES:

STATUTES

RULES

TEXTS

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JURISDICTION

The Appellants brought this action in the District Court to recover damages for personal injuries caused by a member of the United States Air Force while acting within the scope of his employment pursuant to Federal Tort Claims Act, August 1, 1947, ch. 446, 61 Stat. 722, 28 U.S.C.A. 1346(b) and appeal from the Findings of Fact of the District Court, numbers 4, 5(a), 5(b) and 5(c) (R. 29). The jurisdiction of this appeal lies in the Act of June 25, 1948, ch. 646, 62 Stat. 929; 28 U.S.C.A. 1291.

STATEMENT OF FACTS

On June 26, 1955, Appellant Amanda Ferguson was sitting as a passenger in an automobile. The automobile was parked off the pavement of Topeka Street in Kingman, Arizona. While she was sitting there a truck belonging to the United States Air Force and driven by a member thereof in the scope of his employment, ran off the roadway and into the parked automobile. (R. 37.)

The United States of America admits liability for the collision and the injuries and damages caused thereby. (R. 29.)

As a result of the accident Mrs. Ferguson received a moderate cerebral concussion, laceration above the right eyebrow, laceration on the right arm and an injury to the left shoulder (R. 37-38, Ex. 2), and a preexisting hypertensive heart condition was aggragated.

Mrs. Ferguson was taken to the Mohave General Hospital, Kingman, Arizona, where she remained for two days before she was permitted to go home by Dr. Arthur A. Arnold of Kingman, Arizona, her attending physician. (R. 38, Ex. 2.) She remained at home for approximately one week after which time she returned to her job as cook at the Casa Linda Cafe in Kingman (R. 38) where she had been employed for the past five years. (R. 39-40.)

Mrs. Ferguson worked for about four weeks at the cafe (R. 48) before she was forced to stop.

On July 30, 1955, after an attack (R. 42) Dr. Arnold again placed her in the hospital where she remained for four days. (R. 42.) Dr. Arnold sent Mrs. Ferguson to see Dr. John Eisenbeiss, a neuro-surgeon in Phoenix (R. 42-43), who in turn referred her to Dr. John Westfall, a specialist in internal medicine. (R. 42, 43, 51.) Dr. Westfall examined Mrs. Ferguson on August 23, 1955, and Dr. Westfall report-

ed his findings to Dr. Arnold. On September 26, 1955, three months after the accident, Mrs. Ferguson consulted Dr. Walter Brazie of Kingman, Arizona (R. 53), and saw him on an average of once every two weeks until time of trial.

Dr. Ernest A. Born, a physician in Prescott, Arizona, examined Mrs. Ferguson on June 26, 1955, at the request of the Government. (R. 112.)

In May, 1951, prior to the collision, Mrs. Ferguson had been treated for high blood pressure by Dr. Brazie. (R. 73-75.) At this time he saw her on three occasions after which she failed to return for additional treatments (R. 89) even though he advised same. Mrs. Ferguson's blood pressure was the same on Tuesday prior to the trial date as it was in 1951. (R. 73.)

Mrs. Ferguson is married, 55 years of age and a mother of 10 children.

Appellants' Statement of the Case went into further detail concerning the testimony of various witnesses at the trial. These matters will be treated in this brief under Argument.

ARGUMENT I.

The Appellee does not agree with the Appellants that the evidence was uncontradicted that Mrs. Ferguson's disability is permanent. The Appellants are apparently taking the position that there was no variance in the evidence and that the trial court must accept the testimony of the Appellants' experts in the best light for the Appellants and ignore the testimony of the Appellee's expert, and in addition, ignore the fact that the Appelant herself testified at length and was closely observed by the Court and ignore the testimony of the other witnesses.

It appears from the outset that Dr. Arthur Arnold, the physician most familiar and qualified to testify to the injuries

and effects thereof of the Appellant, was not present at the trial although he was available. (R. 129.) Dr. Arnold treated the Appellant at the time of the accident and for three months thereafter. He was her physician at the time of the purported acute attack of July 30, 1955 (R. 42, 43), and sent her to Phoenix for an examination by Dr. John Eisenbeiss, a neurosurgeon. (R. 42.)

As shown by the evidence, Dr. Walter Brazie's testimony was based almost entirely on the history given him by Mrs. Ferguson. (R. 79.) Dr. Brazie stated that he had not seen the hospital reports and had not discussed the case with Dr. Arnold, nor did he do any clinical work other than the taking of Mrs. Ferguson's blood pressure and a urinalysis. (R. 79.) This case would certainly not fall in the limited group of cases which depend essentially upon the knowledge and skill of medical experts, as stated in the case of *Guarantee Insurance Company vs. Industrial Accident Commission,* 88 Cal. App. 2d 410, 199 P. 2d 12, 14, referred to on page 10 of Appellants' Brief.

In *City of Phoenix, et al. vs. Mullen,* 65 Ariz. 83, 174 P. 2d 422 at page 425, the judge instructed the jury that it would be entitled to take into consideration "the nature and extent of the injuries, if any, as a result of the accident in question, whether or not said injuries are temporary or permanent in character." The Arizona Supreme Court stated "Whether or not the said injuries are permanent need not be proven by medical testimony, nor is the jury bound by the testimony of a medical expert who testifies as to the lack of permanency of the injury if there is controverting evidence or testimony from which it may be inferred that the injury is in fact permanent." Also cited in *May vs. Ferrell,* 94 Cal. App. 703, 271 P. 789; *Hecken vs. Union Cab,* 134 Ore. 385, 293 P. 726; *Bach vs. C. Swanston and Son,* 105 Cal. App. 72, 286 P. 1097.

Also in the case of *Joan Hirsh and David Hirsh vs. Helen I. Manley,* 81 Ariz. 74, 300 Pac. 2d 588 at 594, the Arizona Supreme Court cites the case of *Hecken vs. Union Cab. Co.,* 134 Ore. 385, 293 P. 726, in which the Oregon Supreme Court faced with subjective complaints and the absence of corroborative medical testimony as to the permanency of the injuries and the probability of future pain and suffering concluded nevertheless the facts justified the presentation of such questions to the jury.

If we were to follow the Appellants' theory the juries in the above cited cases would have been required to accept the evidnce of the experts.

In questioning Dr. Brazie regarding Mrs. Ferguson's hypertension he stated that her blood pressure was the same on Tuesday prior to the trial as it was in 1951 when he treated her for high blood pressure. (R. 73.) He went on to say that in 1951 Mrs. Ferguson had failed to continue treatment and medication to control her blood pressure, although he had recommended that she continue treatment. (R. 88.) He felt that Mrs. Ferguson could now do light house work and possibly do baby sitting (R. 81) and that in every respect she is better than she was in September, 1955. (R. 83.) Apparently Dr. Brazie felt that some nervous tissue had been damaged but stated that he had no tests run to prove this diagnosis and he had not inquired from Dr. John Eisenbeiss, the neurosurgeon, who examined Mrs. Ferguson as to his findings in this matter. (R. 84-79.) Dr. Brazie stated that there had been no material change in her blood pressure since 1951. (R. 81.)

On August 23, 1955, Dr. John Westfall, a specialist in internal medicine, examined Mrs. Ferguson at the request of Dr. John Eisenbeiss. (R. 91.) After a complete physical examination (R. 93) Dr. Westfall found that Mrs. Ferguson had hypertension. (R. 98.) He said she stated that she had a few headaches over the right eye but at the time of the

examination she had no dizziness and an examination of her eyes showed that they were normal. (R. 98.) It was his opinion that is was possible, but not probable, that Mrs. Ferguson could return to her former occupation (R. 101) and further that there was a possibility that she could do part time work. (R. 101.) He further testified that in many cases persons with an aggravated blood pressure have returned to full activity if the blood pressure is controlled to the same level as before the aggravation. (R. 105.)

Mrs. Ferguson, at the request of the Government, was examined by Dr. Ernest A. Born on June 26, 1956. He testified that at the time of the examination that her eyes, ears, nose and reflexes appeared normal (R. 113); that there was no hesitancy in answering questions and that she walked normally and unhesitantly. (R 114.) In fact he, too, found no objective symptoms except high blood pressure.

He stated it was safe to assume that if Mrs. Ferguson's blood pressure was controlled to the point it had been previously, regardless of the amount, to where she were asymptomatic, she should be able to return to her previous occupation. (R. 118.) That most cases of high blood pressure are controllable (R. 118) and the fact that her high blood pressure, taken two days previous, is the same as it was in 1951 would indicate that it is probable that it can be controlled. (R. 119, 124.) Testimony of a physician as to proportion of persons with the plaintiff's affliction who ultimately recover their health is competent on this point. 25 C.J.S. Damages, Sec. 149, p. 800.

Certainly the fact that Dr. Born was not as dogmatic as the Appellants' experts is no reason to disregard his testimony.

In the case of *Southwestern Freight Lines, Ltd. et al. vs. Floyd,* 58 Ariz. 249, 119 P. 2d 120 at 127, the court states:

> "That a doctor refuses to state positively the results of an injury upon the life of the injured person but, rather, chooses to prognosticate the possibilities of such injury does not weaken its worth or reliability, but commends it."

Mrs. Clara Osterman, Mrs. Ferguson's former employer, testified that Mrs. Ferguson appears better now than when she returned to work in July, 1955. (R. 60.) Mrs. Estelle Hopkins, daughter of Mrs. Ferguson, also stated that her mother's headaches and dizziness have improved. (R. 63.)

From all the above stated facts it certainly cannot be said that the evidence was uncontradicted that Mrs. Ferguson's disability is permanent. "The weight of expert testimony as to damages is for the trier of facts." 32 C.J.S. Sec 569(e), page 401. "If there is a conflict between opinion evidence whether expert or lay and other opinion or other evidence is for the trier of fact to decide." 32 C.J.S. Sec. 572, Page 416.

In *Bowman vs. City and County of San Francisco,* 42 Cal. App. 2d 144, 108 P. 2d 989 at 1000, one of the most quoted cases in point, the court stated as follows:

> "The law does not require a doctor to state that future results are reasonably certain to occur before his testimony is admissible. The ultimate fact to be determined by the jury is whether it is reasonably certain that future evil consequences will flow from the injury. Any evidence reasonably tending in any appreciable degree to prove the fact is admissible. Its sufficiency to prove that fact is largely for the jury." Cited in: *Leenders vs. California Hawaiian Sugar Refining Corp.,* 59 Cal. App. 2d 752, 139 P. 2d 987, and *Khan vs. Southern Pacific Co.,* 132 Cal. App. 2d 410, 282 P. 2d 82.

From the foregoing it only logically follows that once such evidence is admitted, the trier of fact may determine as the ultimate fact that permanent injury will not result from the

facts presented. In other words, the facts presented may lead to the conclusion of lack of permanent injury rather than its presence.

By the statements of Appellants, page 12 of the Appellants' Brief, it appears that the Appellants have assumed that the trial court found that Mrs. Ferguson would be totally disabled for two years and then would be able at that time to return to her former employment. However, it would appear from the previously discussed testimony that a more reasonable assumption could be drawn in that the Court felt that Mrs. Ferguson could shortly return to part time work, either as a cook or at some other occupation, and that the award of $6,000.00 would serve to compensate for her partial loss of wages if prorated over a period of years.

ARGUMENT II.

In Finding of Fact 5(a) the Court found that Mrs. Ferguson's loss of earnings was $3,000.00 from the time of the accident to the time of the trial.

It was set out in the Complaint that Mrs. Ferguson's salary was $60.00 a week. (R. 48.) Mrs. Ferguson testified that she believed that she got a dollar a day for meals (R. 49) but the actual amount paid to her was $60.00 a week. (R. 49.) She stated that she worked *about* four weeks since the accident (R. 48) but no definite dates were given as to when the employment took place. Mrs. Clara Osterman, her employer, testified that Mrs. Ferguson received $60.00 a week with a $6.00 food allowance. (R. 58.) However, that her actual salary was $60.00. (R. 58.) Certainly it cannot be stated from this evidence that the court "assumed" (Appellants' Brief, page 11) that Mrs. Ferguson earned $60.00 a week but that the court found this to be a fact after a careful evaluation of the vague evidence on the point of salary and length of employment after the accident.

ARGUMENT III.

With regard to the award of $1,000.00 for pain and suffering, it should be noted that Mrs. Ferguson spent only six days in the hospital and that her full medical and hospital damages were only $288.90. (R. 23.)

It would appear futile to discuss the testimony on which the Court based this finding 5(c) (R. 29) because the testimony of each witness in some measure would be considered in an award of this nature. In the case of *Coppinger vs. Broderick, et al.,* 37 Ariz. 473, 295 P. 780 at page 781, the Court stated:

> "If there is submitted sufficient evidence to at all justify an instruction on pain and suffering the question on what shall be allowed in that amount is up to the jury, not on certainties but on probabilities."

CONCLUSION

The question raised on this appeal brings out no important question of law. Its issues are solely ones of fact. As stated in Federal Rules Civil Procedure Rule 52, 28 U.S.C.A.:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge credibility of the witnesses."

In *U. S. vs. Oregon Medical Society,* 72 S. Ct. 690, 343 U. S. 326, 96 L. Ed. 978, the Court quoted from *Boyd vs. Boyd,* 252 N. Y. 422, 429, 169 N.E. 632 at 634, which stated:

> "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth."

Upon consideration of the complete transcript there can certainly be no belief that the findings objected to herein are

completely erroneous nor could this Court be left with a definite and firm conviction that a mistake has been committed. *United States vs. United States Gypsum Co.,* 68 S. Ct. 525, 333 U. S. 364, 92 L. Ed. 746.

It is respectfully submitted that upon consideration of all the testimony of each witness there is an abundance of evidence upon which the trial court based each of the findings of fact objected to herein.

Respectfully submitted,

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